313 U.S. 580

Office - Supreme Court, U. S.
FILED
APR 8 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 931

THE FRANKLIN LIFE INSURANCE COMPANY,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

WARREN W. GRIMES,
Counsel for Petitioner.

CONTENTS.

	Page
I. Nature of controversy	1
II. Statement of facts	2
III. Specification of errors	5
IV. Reasons relied upon	6
V. Prayer for writ	7
VI. Brief in support	8
1. Error in holding exercise of State police power does not include requiring security deposits with the State as a condition to doing business in a certain form within the State	8
2. Error in finding a State governmental function not involved because of "election" of petitioner as to form of business	10
3. Error in finding that State statutes did not require the deposits	11
4. Error in finding that because tax not passed on to State there was no direct burden upon the State	12
5. Error in failing to find the deposits were the "means" or "instrumentality" of the State	13
6. Error in finding that because statute did not specifically exempt these deposits, they were taxable	14
7. Erroneous approval of administrative regulation patently broader than statute	14
VII. Appendix:	
1. Federal statutes	17
2. Federal regulations	19
3. Illinois statutes	20
April 18, 1899	20
June 29, 1937, Secs. 248, 250	23, 24
June 26, 1925, Secs. 2, 3, 4	24, 25
June 29, 1937, Sec. 191	25

Table of Cases Cited.

	Page
Ambrosini v. *United States*, 187 U. S. 1, 47 L. Ed. 49	6, 10
Bowers v. *Lawyers Mtg. Co.*, 285 U. S. 182	15
Federal Land Bank v. *Crosland*, 261 U. S. 374, 67 L. Ed. 703	6, 10
German Alliance Ins. Co. v. *Lewis*, 233 U. S. 389, 58 L. Ed. 1011	7, 8
Helvering v. *Gerhardt*, 304 U. S. 405, 82 L. Ed. 1427	6, 9
Helvering v. *Tex-Penn Oil Co.*, 300 U. S. 481	15
Indian Motocycle Co. v. *United States*, 283 U. S. 570, 75 L. Ed. 1277	6, 10
Metcalf v. *Mitchell*, 269 U. S. 253, 70 L. Ed. 392	6, 10
National Union Fire Ins. Co. v. *Wanberg*, 260 U. S. 71, 67 L. Ed. 136	7, 8
Pittman v. *Home Owners Loan Corp.*, 308 U. S. 21, 84 L. Ed. 11	6
Provost v. *United States*, 269 U. S. 443	15
Raybestos-Manhattan v. *United States*, 269 U. S. 60	15
Stirneman v. *Smith*, 100 Fed. 600	12
Thomson v. *Union Pac. R. R.*, 9 Wall. 579, 19 L. Ed. 792	13
United States v. *Merchants Nat. Trust & Savings Bk.*, 101 F. (2d) 399	7, 14
United States v. *Owens*, 100 Fed. 70	10
United States v. *Phellis*, 257 U. S. 156	15
Ward v. *Maryland*, 12 Wall. 427	14
Warwick v. *Bettman*, 102 Fed. 127	11

Other Authorities Cited.

Conference Report No. 1492, 72d Cong., 1st Sess., H. R. 10,236	15
Regulations 71, Bur. Int. Rev.	14
Corpus Juris, Vol. 32, Sec. 18	8
Senate Finance Report No. 665, 72d Cong., 1st Sess., Calendar 705	15

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 931

THE FRANKLIN LIFE INSURANCE COMPANY,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

Petitioner, The Franklin Life Insurance Company, by its undersigned attorney, respectfully prays for a writ of certiorari to the Court of Claims of the United States, to review the judgment of that Court entered in the above cause March 3, 1941 (R. 14).

Nature of Controversy.

The first case to test the validity of the Federal documentary transfer tax as applied to deposits of securities with a State by an insurance company, under State statutes enacted for the regulation of such companies chartered by the State.

Statutes and Regulations Involved.

The statutes and regulations involved appear in the Appendix hereto, *infra,* page 20.

Statement of Facts.

Petitioner is an Illinois corporation engaged in the making and selling of insurance, including life, accident, health and endowment risks, in Illinois and other States (R. 4-5, par. 1). Under Illinois statutes (Appendix., p. 23) and during the period July 1, 1899, to June 30, 1937, when it was discontinued (R. 5, par. 2) procedure was established for the registration of life policies by the State Director of Insurance. Any company issuing registered policies was required to deposit approved securities with the Director "for the common benefit of all the holders of its registered policies and annuity bonds" (Append., p. 24) and to maintain its deposits in an amount equal to the reserve required to cover such policies. After discontinuance of registration on June 30, 1937, it was still required to maintain such deposits to cover registered policies remaining in force (R. 5).

The registration was evidenced by the following required certificate signed and sealed by the Director and on the fact of the policy:

> This policy is registered; and approved securities, equal in value to the legal reserve thereon, are held in trust by this department (R. 5).

On failure of a company to maintain the required deposits, after sixty days notice by the Director, the company shall be deemed insolvent and proceeded against under special statutes (R. 6).

During the period of deposit, all securities are and must be included among the company assets on balance sheets

and Annual Statements required to be filed with the State. No authority exists in the Director of Insurance or any other department or agency of the State, by statute, agreement or otherwise, to dispose of such deposited securities except back to the depositing company; except upon insolvency, procedure for which is provided by special statutes on liquidation, dissolution or rehabilitation of insurance companies (R. 6, par. 6).

During the period of deposit, depositing companies have the right to withdraw any security or to substitute others of equal value and character in their stead, subject only to the maintenance of the required balance; and so long as the depositing company is solvent and keeps up its deposits, it may collect as its own the interest, coupons, and other income on the securities deposited as the same accrues. In practice, the Company calls for and receives from the Director of Insurance, in advance of maturity dates, any interest-bearing coupons about to mature (R. 6, par. 7).

Petitioner sold registered policies and from time to time both deposited with and withdrew securities from the Director of Insurance under the statutes referred to (R. 6, par. 8).

As to unregistered bonds so deposited, the petitioner used a legend stamped across the face of the bond as follows:

> This (bond) is the property of and deposited by the The Franklin Life Insurance Company, of Springfield, Illinois, with the Director of Insurance of the State of Illinois, and held by him in trust for the benefit and security of the members, policy holders, or creditors of the said The Franklin Life Insurance Company, as required by and pursuant to the laws of the State of Illinois. It is not negotiable or transferable until withdrawn from said trust, at which time it shall be endorsed by the Director of Insurance.

The form or endorsement used by the Director of Insurance is by rubber stamp and as follows:

> Withdrawn from above trust this — day of ——, A. D. 19—. Without recourse on me.
>
> —— ——,
> *as Director of Insurance*
> *of the State of Illinois.*
>
> Acknowledged before me this — day of ——, 19—.
>
> —— ——,
> *Notary Public.*
>
> My commission expires —— —, —— (R. 7).

Prior to October, 1939, neither the petitioner nor the State purchased or used Federal documentary transfer stamps under Schedule A-9 of Title VIII of the Revenue Act of 1926 as added by Section 724 (a) of the Revenue Act of 1932 (R. 7).

On October 2, 1939, the Collector of Internal Revenue at Springfield, Illinois, required the petitioner to purchase, and petitioner did purchase from him and cancelled, such documentary stamps to cover such bond deposits and withdrawals, beginning January 14, 1936, and ending August 8, 1939; the deposits amounting to a total of $5,443,000 and the withdrawals amounting to $1,162,000; the said stamps amounting to $2,177.20 and $564.80 on the respective sums, or a total in stamps of $2,742.00 (R. 7).

Under date of November 3, 1939, the petitioner filed with said collector a claim for refund of the said amount $2,742.00. The grounds relied upon in said claim were:

> (a) Neither the deposits of the securities with the State Insurance Department nor their return to the taxpayer constituted a transfer or delivery as contemplated by Schedule A-9 of Title VIII of the revenue act of 1926 as added by section 724 (a) of the revenue act of 1932; and

(b) Congress has no power to impose such a tax on transactions in which a State must always be one of the parties under the circumstances in this case (R. 7-8).

On November 20, 1939, the Commissioner of Internal Revenue rejected the claim (R. 8). On January 8, 1940, petitioner filed suit in the Court of Claims of the United States, upon the grounds recited in the claim (R. 1). That court made special findings of facts upon stipulation of the parties and, on March 3, 1941, dismissed the petition and entered judgment for the United States (R. 14). The present petition is directed toward review of that decision.

Specification of Errors.

1. The Court of Claims erred in holding that the exercise of State police powers does not include requiring security deposits with the State as a condition to doing business in a certain form within the State.

2. The Court of Claims erred in finding that a State governmental function was not involved because of the "election" of petitioner to engage in a certain form of business.

3. The Court of Claims erred in finding that the State statutes did not require the deposits covered by this case.

4. The Court of Claims erred in holding that, because the tax was not passed on to the State, there was no direct burden upon the State.

5. The Court of Claims erred in failing to find that the deposit of securities was the "means" or "instrumentality" employed by Illinois in the exercise of a governmental function, and therefore exempt.

6. The Court of Claims erred in considering that because these deposits are not within the statutory exemptions, they were subject to Federal taxation.

7. The Court of Claims erred in approving an administrative regulation which on its face extends the statute by punctuation and in violation of the expressed legislative intent.

Reasons Relied Upon.

1. The Court of Claims has decided an important question of Federal law which has not been, but should be, settled by this Court; in that the decision is the first to deal with Federal documentary transfer taxes applying to security deposits with States, required by State laws regulating insurance companies. It affects every insurance company doing business. The decision itself states that (as to constitutionality) "a difficult and somewhat doubtful question is thus raised".

2. The Court of Claims has decided a Federal question in a way probably in conflict with applicable decisions of this Court, in particular *Ambrosini* v. *U. S.*, 187 U. S. 1, 47 L. Ed. 49; *Federal Land Bank* v. *Crosland,* 261 U. S. 374, 67 L. Ed. 703; *Metcalf* v. *Mitchell,* 269 U. S. 253, 70 L. Ed. 392; *Indian Motorcycle Co.* v. *U. S.*, 283 U. S. 570, 75 L. Ed. 1277; and *Pittman* v. *Home Owners Loan Corp.,* 308 U. S. 21, 84 L. Ed. 11; in that it holds the Federal tax may constitutionally be applied to transactions exclusively with a State exercising a strictly governmental function under its police powers. It attempts to decide only under *Helvering* v. *Gerhardt,* 304 U. S. 405, 82 L. Ed. 1427, which it specifically states "does not directly decide the question", and spells certain rules from that case none of which it admits was applied to the present state of affairs.

3. The Court of Claims has decided an important question of General Law in a way probably untenable or in

conflict with the weight of authority, in that its decision discards a fundamental principle of Corporation Law that in purely regulatory matters involving qualification the creating State has exclusive jurisdiction. As applied to insurance companies the decision is in conflict with *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389, 58 L. Ed. 1011; and *National Union Fire Insurance Co.* v. *Wanberg,* 260 U. S. 71, 67 L. Ed. 136.

4. The Court of Claims decision has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, in that it has approved the practice of administrative regulations altering by punctuation a statute in order to extend the scope beyond the legislative intent.

5. The decision of the Court of Claims is in conflict with that of the Circuit Court of Appeals for the Ninth Circuit in *U. S.* v. *Merchants National Trust & Savings Bank,* 101 F. (2d) 399, in disregarding the transactions as "transfers by operation of law" and therefore specifically excepted from the tax by the Regulations.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Court of Claims of the United States, commanding said court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all the proceedings of the Court of Claims in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court of Claims be reversed; and that the petitioner be granted such other and further relief as may seem proper.

WARREN W. GRIMES,
Shoreham Building,
Washington, D. C.,
Counsel for Petitioner.